

to do. A compromise? Perhaps. But the relationship works. The development of the respective roles of the AG/SJ and the DPP means they have to work closely together. That willingness is necessary to make the system work.

May I conclude my remarks with this quote from the communique issued after the Commonwealth Law Ministers Conference in Canada in August 1977:

In recent years, both outside and within the Commonwealth, public attention has frequently focused on the function of law enforcement. Ministers endorsed the principles already observed in their jurisdictions that the discretion in these matters should always be exercised in accordance with wide considerations of the public interest, and without regard to considerations of a party political nature, and that it should be free from any direction or control whatsoever. They considered, however, that the maintenance of these principles depended ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned.

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Prosecutorial Discretion, Independence, and Accountability

Two decisions in early 1998 by the Secretary for Justice regarding non-prosecution in the case of the Xinhua News Agency under the Personal Data (Privacy) Ordinance¹ and the case of Ms Sally Aw Sian concerning conspiracy to defraud advertisers in the Hong Kong Standard² have focused public attention in Hong Kong on the issue of the constitutional position of the Secretary for Justice, particularly the exercise of her discretionary power in prosecution, and the principles of independence and accountability relating to the exercise of this power. This comment will attempt to describe and analyse some of these fundamental issues.

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¹ See Paul Harris, 'Can the Xinhua Agency be Exempt from the Law?' Hong Kong Economic Times, 20 March 1998, p A29 (in Chinese). It was alleged that the Hong Kong Branch of the Xinhua Agency was in violation of s 19 of the ordinance by failing to reply within forty days to a personal data request submitted by Ms Emily Lau (LegCo member) on 20 December 1996. It replied after ten months that it held no relevant data regarding Ms Lau. When questioned by journalists, Chief Executive Tung Chee-hwa explained that no prosecution was undertaken because there was only a technical breach of the law. Subsequently Ms Lau initiated a private prosecution against Mr Jiang Enzhu, Director of the Hong Kong Branch of the Xinhua Agency, by a summons issued at the Eastern Magistracy on 4 May 1998. Counsel for Mr Jiang challenged the summons by way of judicial review, and achieved initial success on 26 May 1998. Further proceedings are pending at the time of writing.

² 'Publisher Named in ICAC Charges,' South China Morning Post, 18 March 1998; 'Row over Aw Decision,' South China Morning Post, 19 March 1998.

Although this is not expressly provided for in the Basic Law, it may safely be assumed that the office of the Secretary for Justice is the exact equivalent of the Attorney General in Hong Kong's colonial legal system.³ Therefore, to understand the nature of this office, we need to go back to the law and practice relating to this former office. The powers, responsibilities, and accountability of Hong Kong's Attorney General were examined by the Court of Appeal in *R v Tsui Lai-ying*⁴ and *Cheung Sou-yat v R*.⁵ In these cases, the court held that the Hong Kong Attorney General had the same powers and responsibilities as the Attorney General of England under the common law (including the law relating to the prerogative), although the basis of their accountability was different. In England, the Attorney General's accountability to Parliament is part of the doctrine of ministerial responsibility, whereas in Hong Kong, although 'susceptible to having his conduct questioned by members of the Legislative Council,'⁶ the Attorney General was not an elected politician or a member of a government whose continuation in office depended on the confidence of the elected chamber of Parliament.

In England and in all common law jurisdictions which have Attorneys General (AGs) with the same functions as the English AG, it has been recognised that the AG performs a dual role, one political and the other legal or quasi-judicial.⁷ In some of these jurisdictions (but not England), the AG is a member of the Cabinet and as such performs a political role in top policy-making.⁸ In England, a constitutional convention has evolved since 1928 whereby the AG is not a member of the Cabinet,⁹ but his political role is still significant as the top legal adviser to the government and its ministers and a participant in the policy-making process. On the other hand, many of the powers exercised by the AG are quasi-judicial in nature, and it has been well-established that they must be exercised in accordance with legal principles and considerations of public interest to the exclusion of partisan political interests.

³ See Hong Kong Reunification Ordinance, s 24 (all common law powers and statutory powers which were vested in public officers before 1 July 1997 shall continue in existence and vest in the corresponding officers in the HKSAR); Declaration of Change of Titles (General Adaptation) Notice, LN 362 of 1997, made under s 55 of the Interpretation and General Clauses Ordinance (providing, inter alia, for the substitution of the title of Secretary for Justice for that of Attorney General). See also Legal Officers Ordinance, s 5 (regarding the Secretary for Justice being entitled in the courts of Hong Kong to the same rights as are enjoyed in England by the Attorney General of England).

⁴ [1987] HKLR 857.

⁵ [1979] HKLR 630.

⁶ *Tsui Lai-ying* [1987] HKLR 857, 867 (per Silke JA).

⁷ John L J Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet and Maxwell, 1984), pp 63, 68; William Dale, *The Modern Commonwealth* (London: Butterworths, 1983), p 117; Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens and Sons, 1966), p 352; John L J Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964), pp 6, 223; *LegCo Proc* 1986-87, p 1272 (25 March 1987; Attorney General Michael Thomas QC).

⁸ For example in Canada (where the office of Attorney General is combined with that of Minister of Justice), Australia, and New Zealand, the AG is a member of the elected House of Parliament and a member of the Cabinet. See Dale (note 7 above), p 119.

⁹ Dale, *ibid*, p 117; Edwards (1984) (note 7 above), p 73.

Examples of such quasi-judicial powers include the power to decide whether to prosecute in a particular case, the power to consent to prosecute where there is an express statutory requirement of such consent, the power to enter a nolle prosequi, and the power to enforce a public right in civil proceedings either on his own initiative or by granting a fiat in a relator action.¹⁰

After the *Campbell* case (1924),¹¹ which has been described by a leading scholar as having 'a lasting place in any study of the constitutional position of the Attorney-General of England,'¹² the principle has become well-established that the AG is entitled to exercise his quasi-judicial powers in a completely independent manner. Although he may discuss a case with other senior members of the government (such as the Prime Minister) and consult their views, they may not give directions to him or otherwise interfere with the exercise of his powers. In the *Campbell* case itself, it was suspected that the AG withdrew the prosecution of Mr Campbell (the acting editor of a communist magazine) for incitement to mutiny under pressure from the Cabinet and Prime Minister Ramsay MacDonald, and the dissatisfaction in Parliament was so strong that it led to the downfall of the MacDonald government. A similar incident of alleged government interference with the AG's independence occurred in Australia in 1977. The incident arose from the case of *Sankey v Whitlam*,¹³ a private prosecution against former Prime Minister Whitlam and members of his Cabinet. The parties requested AG Robert Ellicott QC to take over the proceedings. The AG attempted to investigate the case but the Cabinet refused to allow him access to relevant documents. The Cabinet wanted him to take over the case in order to terminate the prosecution. The AG resigned in protest against alleged government interference with the AG's discretion in criminal proceedings.

Given the AG's independence in the exercise of his quasi-judicial powers, the question arises as to the nature and form of his accountability in situations where there is doubt regarding whether the power has been properly or fairly exercised. For example, are there any remedies for a victim of a crime where the AG decides not to prosecute the suspected offender? Or what about a citizen who seeks the AG's consent in a relator action to enforce a public right? The latter situation arose in the *Gouriet* case,¹⁴ which is the leading authority on the possibility of judicial review of the exercise of the AG's quasi-judicial powers.

¹⁰ See generally A H Y Chen, 'The Powers and Accountability of the Attorney General' (1990) 20 HKLJ 6, 9-10.

¹¹ For a detailed discussion of this case, see Edwards (1964) (note 7 above), ch 11 ('The independence of the Attorney-General in criminal prosecutions: the Campbell case and its aftermath').

¹² Ibid, p 199.

¹³ [1977] 2 NSWLR 570; [1980] CLR 1. For a detailed discussion, see (1977) 51 ALJ 675; Edwards (1984) (note 7 above), pp 379-88. See also *Report on Review of Independence of the Attorney-General* (North Quay, Queensland: Electoral and Administrative Review Commission, 1993), p 11.

¹⁴ *Gouriet v Union of Post Office Workers* [1978] AC 435. For a detailed analysis, see Edwards (1984) (note 7 above), pp 129-37 ('The *Gouriet* case and its constitutional implications').

In this case, the House of Lords, overturning the Court of Appeal's decision, held that the AG's exercise of the power to decide whether to consent to a relator action was not susceptible to judicial review, because it involved the weighing and balancing of various aspects of the public interest, and such decisions on the public interest 'are not such as courts are fitted or equipped to make.'¹⁵ Hence the AG did not need to defend his decision before a court, although he could be (and was indeed in this case) called upon to do so before Parliament. The House of Lords stressed 'the undesirability of making the matter one of disputation in the courts, instead of in Parliament,'¹⁶ and pointed out that any necessary remedy must 'lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts.'¹⁷

As a leading scholar on the law and practice relating to the AG has pointed out,¹⁸ there are indeed many precedents of the House of Commons of the UK Parliament questioning the AG and debating cases in which the AG made a controversial decision in the exercise of his quasi-judicial power, including decisions on the institution, non-institution, or withdrawal of criminal proceedings, although it should be noted that such questioning and debate normally took place only after the proceedings in the relevant case had terminated. This parliamentary practice is a living and powerful demonstration of the accountability of the AG to the public in the independent exercise of his quasi-judicial functions. The practice has been followed in Hong Kong. Attorneys General Michael Thomas and Jeremy Mathews both accepted the principle of their accountability to the public through the Legislative Council, and answered questions and provided explanations of prosecution policy in the Council in the controversial cases of Alan Bond (1987)¹⁹ and Christopher Harris (1989).²⁰ In the political system of the SAR, the Secretary for Justice and other senior officials are no longer full members of the legislature, but the Basic Law (Art 64) expressly provides for their accountability to the Legislative Council and their obligation to answer questions in the Council. Indeed, Ms Elsie Leung, the Secretary for Justice, appeared and spoke at the special meeting on the Sally Aw case convened by the Administration of Justice and Legal Services Panel of the Provisional Legislative Council on 23 March 1998.²¹

Part of former AG Michael Thomas's speech on prosecution policy in the Legislative Council on 25 March 1987 has now been incorporated into the Department of Justice's official document on *Prosecution Policy: Guidance for*

¹⁵ [1978] AC 435, 482 (per Lord Wilberforce).

¹⁶ Ibid, p 512 (per Lord Edmund Davies).

¹⁷ Ibid, p 524 (per Lord Fraser).

¹⁸ Edwards (1984) (note 7 above), pp 118-19; Edwards (1964) (note 7 above), pp 224-5.

¹⁹ LegCo Proc 1986-87, pp 1269-76 (25 March 1987).

²⁰ LegCo Proc 1989-90, pp 55-61 (18 October 1989).

²¹ South China Morning Post, 24 March 1998.

Government Counsel (1998).²² The document also refers to British AG Sir Hartley Shawcross's classic statement on the AG's constitutional position in a speech before the House of Commons in January 1951 defending his prosecution of some gas maintenance workers who had gone on strike.²³ However, the most important part of this document as far as decision-making on whether to prosecute or not is concerned largely reproduces the relevant part of the British Code for Crown Prosecutors prepared under the Prosecution of Offenders Act 1985.²⁴ Both this Code and the Hong Kong document describe prosecutorial decision-making as a two-stage process. The first stage consists of evaluation of the evidence and assessing whether there is a 'reasonable prospect of conviction' if the case goes to trial. The second stage is to consider whether bringing a prosecution would be in the public interest. However, most of the factors highlighted in the Code under the heading of 'public interest' are in fact characteristics of the suspected offender or the particular offence concerned, and many of them are in the nature of mitigating or exculpatory factors. They are 'negative' criteria in the sense that they are mainly formulated as possible reasons for not prosecuting even though prosecution may be justified from the evidential point of view. The formulation has therefore been criticised by some British scholars as failing to present a positive, coherent, and comprehensive set of guidelines regarding when prosecution should be launched.²⁵

Although there may be room for improvement in the existing guidelines in the UK and in Hong Kong on how the prosecution decision should be made,

²² This document is the up-to-date version of Attorney General's Chambers, *Prosecution Policy: Guidance for Crown Counsel* (Hong Kong: Government Printer, 1993). In addition to general updating and revision, the 1998 document adds (a) a section on the rights and duties of citizens under the Basic Law; (b) a detailed examination of the duty of the prosecutor to ensure a fair trial through full disclosure of material that may assist the defence; (c) a section on private prosecutions, and the circumstances in which it may be appropriate for the Secretary for Justice to intervene in such prosecutions; (d) a section indicating the circumstances in which it may be appropriate to re-start a prosecution; (e) a section which addresses the proper balance between the victim's interests and the public interest; (f) a section on the performance pledges to which prosecutors aspire; and (g) a conclusion indicating the Department of Justice's commitment to providing the people of Hong Kong with an independent, effective, fair, and just prosecution service. I am grateful to Mr I Grenville Cross QC, SC, Director of Public Prosecutions, for drawing my attention to these points.

²³ According to this statement, 'the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy.... The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.... If political considerations, which in the broad sense that I have indicated affect government in the abstract, arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations' (483 House of Commons Report (5th series), col 682). This statement is also cited in Dale (note 7 above), pp 117-18. For the background of the statement, see Edwards (1964) (note 7 above), pp 220-4.

²⁴ For a discussion of this Code, see James Casey, *The Irish Law Officers* (Dublin: Round Hall Sweet and Maxwell, 1996), pp 268-71.

²⁵ Graham Mansfield and Jill Peay, *The Director of Public Prosecutions: Principles and Practices for the Crown Prosecutor* (London: Tavistock Publications, 1987), pp 34-9.

the mere preparation and publication of the guidelines is a welcome development since it represents a departure from the previous practice of non-disclosure of such information.²⁶ Indeed, starting from the late 1970s and early 1980s, parallel developments have occurred in Britain, the USA, Canada, Australia, and New Zealand whereby criteria used in making decisions regarding prosecution became transparent and subject to public scrutiny.²⁷

However, openness and publicity regarding prosecution guidelines do not mean that it becomes unnecessary to call for explanations for decisions as to whether to prosecute in specific cases, particularly where there is doubt as to whether the published criteria have been properly applied. In this regard, the legislature still has a vital role to play in scrutinising such decision-making by exercising its power to question the independent prosecution authority and holding it accountable to the public. But in the nature of things, there is a limit to the extent and effectiveness of such scrutiny. For example,²⁸ the prosecution authority may legitimately refuse to disclose certain details of the case in order to protect the interests of certain potential witnesses, or to prevent the suspected offender from being subjected to a trial by the media and the public without the procedural safeguards of a trial by the court, or to avoid revealing certain policies regarding non-prosecution which if revealed would encourage certain offences to be committed with impunity. Hence in the final analysis, there seems to be no way to achieve a perfect institutionalisation of the principle of accountability of the independent prosecution authority. As pointed out in the communique issued after the Commonwealth Law Ministers' Conference in Winnipeg in 1977, the performance of the AG's functions as guardian of the public interest depends 'ultimately upon the unimpeachable integrity of the holder of the office whatever the precise constitutional arrangements in the State concerned.'²⁹

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²⁶ Edwards (1984) (note 7 above), pp 405-6.

²⁷ Ibid, pp 405-6, 431-4; Casey (note 24 above), pp 271-3.

²⁸ See generally Edwards (1984) (note 7 above), pp 119, 429-31.

²⁹ Ibid, p 62; also quoted in Dale (note 7 above), p 118. In the *Report by the Working Party to Review the Decision-Making Process in Prosecutions Division of the Legal Department* (December 1995), the Working Party pointed out that the constitutional independence of the Attorney General 'has always excluded the obligation to have to explain the reasons for any decision whether that decision is to prosecute or not to prosecute. To be required to explain any such decision publicly would not only compromise his independence but would also prejudice the interests of the person about whom a decision to prosecute or not to prosecute has been made' (para 5.4 of the Report). However, the Working Party also 'notes that the current practice is for the Attorney General, when called on, to provide the legislature with explanations to demonstrate that all relevant legal and policy factors have been considered' (para 5.13). The Working Party, chaired by Mr Peter Nguyen QC, then Director of Public Prosecutions, was appointed by Attorney General Jeremy Mathews to review the decision-making process in the Prosecutions Division of the Legal Department and to produce a report for submission to the Legislative Council.

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